In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-113

ROMAN STANISLAW RYBA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of willful refusal to report for induction, in violation of 50 U.S.C. App. 462(a). On February 27, 1970, he was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 9-12) and denied a petition for rehearing (Pet. App. 14).

The essential facts are not in dispute. Petitioner, a citizen of Poland, entered the United States on October 3, 1961, and was admitted as an immigrant with the privilege of permanent residence in the United States (Tr. 1).[1] On attaining the age of 18 in

[1] "Tr" refers to the trial transcript, reprinted as petitioner's appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

1965, he registered with the Selective Service System, Local Board Number 18, Newark, New Jersey; he was classified I–SH as a high school student (Tr. 8).

Following his graduation from high school, petitioner began working for his father in the construction business. On July 27, 1967, he wrote to his local board and requested a hardship (III–A) deferment, stating that his mother had died in April 1966, and that his father was dependent on him in his business (Tr. 11). This request was denied and, on September 20, 1967, petitioner was placed in Class I–A (Tr. 10). An appeal was taken to the State Appeal Board, which, after a *de novo* review of petitioner's Selective Service file, voted unanimously (4–0), on December 12, 1967, to classify petitioner I–A (Tr. 13).

On January 4, 1968, petitioner reported for a physical examination as ordered; he was found acceptable for induction, and thereafter received an order to report on February 27, 1968 (Tr. 14). Prior to the scheduled induction date, however, petitioner sought, and was granted, a six months' postponement of induction to take care of personal matters relating to the settlement of his mother's estate in Poland (Tr. 15–17).[1]

On August 29, 1968, a notice to report for induction on September 18, 1968, was mailed to petitioner at his last known address (Tr. 16). Prior to the reporting date, the local board received a letter from petitioner's father, dated September 7, 1968, informing the board

that petitioner had left the country on July 17, 1968, and suggesting that his departure may have been related in some way to the matter of his inheritance, but not indicating where he had gone (Tr. 17).[2] When petitioner failed to report as ordered on September 18, 1968, the local board, in line with customary practice, reported him to the United States Attorney as a delinquent registrant (Tr. 17).

Thereafter, on December 12, 1968, petitioner, having returned to the United States and learned that the F.B.I. desired to question him concerning his draft status (Tr. 46–47), reported to the F.B.I. office in Newark and spoke with Special Agent James Yelvington. Agent Yelvington testified that, after advising petitioner of his constitutional rights (Tr. 50), he handed petitioner a letter prepared by the clerk of the local board ordering him to report immediately for induction (Tr. 18). Petitioner read the letter and returned it to the agent, declaring that he did not intend to report (Tr. 52–53). He then left the F.B.I. office and returned home; later that day, petitioner was arrested.

Several months after the indictment was returned, petitioner's counsel wrote to the local board and for the first time requested, in essence, that the case be reopened so that petitioner could seek an alien (IV-C) classification (Tr. 20). The board reviewed the request and, on April 9, 1969, found petitioner ineligible for such classification under 32 C.F.R. 1622.42

[2] Petitioner had in fact gone to Canada with the stated intention of becoming a "permanent resident" there (Tr. 121–123).

(b) (Tr. 20–21).[3] Petitioner sought to appeal this determination, and, on May 14, 1969, the board again decided not to reopen the case by vote of 4–0 (Tr. 22).

The trial and conviction followed and the court of appeals affirmed.

Petitioner contends here, as he did below, that the refusal of his local board to reopen his classification and place him in Class IV–C, on receipt of his father's letter stating that he had left the country, invalidated the outstanding induction order. We do not agree.

Congress, under its broad grant of power in the Constitution (Art. I, Sec. 8), "[t]o raise and support Armies," has provided that "every male citizen of the United States and every male alien admitted for permanent residence * * * shall be liable for training and service in the Armed Forces of the United States" (50 U.S.C. App. 454). See *United States* v. *Rumsa*, 212 F. 2d 927, 936 (C.A. 7). As the court below pointed out (Pet. App. 11), "[t]he present record indicates, without any evidence or basis for implication to the contrary, that * * * [petitioner] was admitted to this country * * * as an immigrant privileged to remain permanently." As a result, petitioner's status as an alien did not disqualify him from induction; nor was he, as an alien, denied

[3] That regulation provides: "In Class IV–C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability * * * and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form 130) * * *."

due process by being ordered to report for induction. *United States* v. *Lamothe,* 152 F. 2d 340, 342 (C.A. 2).[4]

It is argued, however, that, when the local board received information that petitioner had "left the country," it had a duty under the regulations to classify him IV–C.[5] But, petitioner never notified his local board that he had moved to Canada with an intention to remain there.[6] The only information indicating that he might have "departed from the United States" was the ambiguous letter from his father (Tr. 17), which suggested that petitioner's absence was perhaps in some way connected with the settlement of his mother's estate

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[4] Moreover, even if petitioner could have established that he had "remained in the United States in a status other than that of a permanent resident for a period exceeding one year * * *", he remained under a duty to report for induction pursuant to the outstanding order until he elected to make application to be relieved from such liability * * *" (50 U.S.C. App. 454(a)). As we have already shown, petitioner failed to make application until some months after the present indictment had been returned (Pet. App. 11).

[5] 32 C.F.R. § 1622.42(c) provides: "In Class IV–C shall be placed any registrant who is an alien and who has departed from the United States. Such alien shall be placed in Class IV–C even though he is a delinquent but this classification shall in no way relieve him from liability for prosecution for violation of the Selective Service law. If any registrant so classified under this paragraph returns to the United States, his classification shall be reopened and he shall be classified anew."

[6] In pertinent part, 32 C.F.R. § 1641.7(a) provides that "[i]t shall be the duty of every classified registrant to keep his local board * * * informed of his occupational, marital, family, dependency, and military status * * *, [and] of his home address * * *. Every classified registrant shall, within 10 days after it occurs, report to his local board in writing every change in such status * * * and home address. * * *"

in Poland, for which he had earlier received a postponement of induction. There was thus no apparent reason for the board to assign petitioner a IV–C classification.

Moreover, 32 C.F.R. 1622.42(c) explicitly provides that a IV–C classification assigned to an alien who departs from the United States "shall in no way relieve him from liability for prosecution for violation of the selective service law." Thus, even if it could be said that the board erred here in failing to place petitioner in Class IV–C after receiving his father's letter—a point we dispute—such error would not excuse petitioner's subsequent failure to report for induction. Nor would the board's later refusal to reopen have any bearing on the validity of the induction order; for, that refusal occurred some time after petitioner had committed the acts constituting the offense for which he is presently charged. See, *e.g.*, *United States* v. *Gearey*, 368 F. 2d 144, 149 (C.A. 2); *Davis* v. *United States*, 374 F. 2d 1 (C.A. 5); *Dugdale* v. *United States*, 389 F. 2d 482 (C.A. 9); *United States* v. *Uhl*, 436 F. 2d 773, 774 (C.A. 9), and the cases there cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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